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In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN L. WOMACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 219–224;[1] Pet. App. 1a–5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961 (R. 225). The petition for a writ of certiorari was filed on February 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court was correct in excluding books and magazines available to the public, proffered

[1] "R." refers to the Joint Appendix filed in the court of appeals.

by petitioner to show community standards, and in refusing to allow testimony of psychiatrists and psychologists on this same issue.

2. Whether the trial court's instructions comported with the standards adopted in *Roth* v. *United States*, 354 U.S. 476.

3. Whether the warrant of arrest, incident to which a search was made, was valid.

4. Whether evidence of *scienter* was admissible.

STATEMENT

Following a jury trial held in the United States District Court for the District of Columbia, the petitioner was convicted on each of 29 counts of a 31-count indictment (R. 1–9),[2] charging that he knowingly distributed through the mails obscene photographs, (counts 5, 12, 20) and circulars and advertisements giving information as to how and where obscene photographs might be obtained (counts 1–4, 6–8, 10–11, 13–19, 21–30) (R. 218). The petitioner was sentenced to a term of imprisonment of 1 to 3 years on each count, to run concurrently (R. 218). The court of appeals unanimously affirmed the conviction (R. 219–224; Pet. App. 1a–5a).

1. The pertinent evidence adduced at the trial by the government revealed that petitioner, under the name Continental Artists, conducted a mail order business out of Washington, D.C., soliciting orders for, and distributing photographs of, nudes through

[2] Counts 9 and 31 were dismissed on the government's motion at the close of its case (R. 115, 206).

the mails (R. 103).[3] Among the recipients of unsolicited advertising material from Continental Artists—containing samples of male and female nude photographs with the pubic areas draped (See Gov. Exs. 1–4, 6)—were David Morrow, age 13, Butler, Pennsylvania (R. 41–42), David G. Shaub, age 19, Stamford, Connecticut (R. 45–49), Judson E. Hodges, Jr., age 18, Lynnhaven, Virginia (R. 51–52), and Albert Crane, Jr., age 15, Salt Lake City, Utah (R. 56–57).[4] Postal inspectors Kenny and Simon, under various fictitious names, also received the advertising material sent out by petitioner (see, *e.g.*, R. 72–75, 79–81, 86–88, 91, 93; Gov. Exs. 13–15, 17, 20–32). Inspector Simon, on May 18, 1959 (count 5), under the test name Allen Spencer, purchased a set of photographs of undraped male nudes from Continental for $10 (R. 83–84, 88; Gov. Ex. 18). On other advertising material mailed to "Spencer", a set of 12 prints of male nudes was listed at a price of $25 (R. 94–96; Gov. Ex. 26).

Also introduced into evidence without objection on the issue of *scienter* was a letter dated October 14, 1959, written by petitioner under the letterhead of

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[3] Petitioner also operated out of Washington, D.C., under the names "Classic Style" and "Potomac Associates." He owned the magazines "Trim", "Physique", and "Manual", and published "Grecian Guild Pictorial" (R. 82, 99, 101–103, 117–118, 132).

[4] Other similar unsolicited advertising materials was mailed by Continental Artists, to Eleanor Gullery, Chicago, Illinois (R. 58–61; Gov. Ex. 7), Myron M. Sager, Accokeek, Maryland (R. 61–63; Gov. Ex. 8) and to the Boys' Club, Ypsilanti, Michigan (R. 176–177; Gov. Exs. 37–38).

"Trim, Young America's Favorite Physique Publication", Post Office Box 385, Washington, D.C., to "Male Today", a New York Publication (R. 75–76). In this letter dealing with the exchange of mailing lists, petitioner wrote: "Could we save each other money, have enough duplicate stickers made, so that you can send me two sets of each list, and I will do the same. In that way, we have one for immediate mailing and one for the permanent sucker list. Thus we will both save extra typing expense" (R. 76; see also R. 77–78).[5] Agent Kenny testified that he had heard the phrase "sucker list" used quite frequently in his investigations into the mailing of obscene material, and stated that it referred to persons who are "willing to spend any amount of money to purchase this type of picture" (R. 78–79).

Inspector Simon testified that on June 3, 1959, he had a conversation with petitioner concerning the magazines "Trim" and "Physique", and that petitioner commented that "we are adults, we don't have to kid each other, we know who is interested in magazines and pictures of that type," and that "pictures sold by Continental Artists and the magazine Trim were intended for or that the purchasers were homosexuals" (R. 102–103).[6]

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[5] Petitioner had a circulation list of some four thousand names, which he had said was worth $10,000 to him (R. 181).

[6] Over petitioner's objection, a letter written by petitioner dated September 10, 1958, under the letterhead of "Trim" to "Mercury Photographic Service", Norfolk, Virginia, was introduced in evidence on the issue of *scienter* (R. 109–113). This letter dealt with various male models and their appeal,

2. Petitioner called two psychologists, Dr. Earl Davy and S. Gordon Link, and two psychiatrists, Drs. Michael M. Miller and Wladimir Eliasberg, as witnesses. They testified that, in their opinions, the dominant theme of the material mailed by petitioner (specifically Gov. Exs. 11, 12, 18), taken as a whole, would not appeal to the prurient interest of the average person (R. 146, 155, 158, 186). Dr. Davy was not permitted to testify to his opinion as a psychologist as to "whether to the average person, applying contemporary community standards, the material you have just examined would appeal to the prurient interest of such person," for the trial judge noted that "[w]e don't know what standards the witness would apply" (R. 138–139).

Petitioner also sought to introduce into evidence various magazines and books containing photographs of male and female nudes to show "what the contemporary community standards are" (R. 124–125). The trial court excluded this material as irrelevant, pointing out that the "jury has to decide whether this series of publications, this material, is or is not obscene. The mere fact that some other material can be picked up on the newsstands, for example, or may be sent through the mails that is equally bad, or equally good, whichever way you put it, is not evidence" (R. 125; see also R. 126–128, 130–131).

3. The trial judge charged the jury on the standard

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stating, in part, that "physique fans want their truck driver types already cleaned up, showered, and ready for bed" (R. 112–113).

it was to apply in determining obscenity in pertinent part, as follows (R. 212–213):

> * * * The test of obscene matter, as laid down by law, is whether the particular material or publication in question charged to be obscene * * * would, to the average person, applying contemporary community standards, convey a dominant theme that the material being taken as a whole, would appeal to what is known as the prurient interest. * * *
>
> The test is whether the material would arouse sexual desires or sexually impure thoughts in the average person or in all those whom it is likely to reach. The test in each case is the effect of the publication considered as a whole, not on any particular class or any particular group, but upon all those whom it is likely to reach.
>
> * * * * *
>
> The jury and the jury alone, are the exclusive judges of what the common conscience of the community is, and what the present-day standards of the community are. And in determining the conscience of the community, the jury is to consider the community as a whole, the young and the old, educated and uneducated, religious and irreligious, man, woman or child.
>
> * * * * *
>
> In other words, the question is not whether every portrayal of a nude human body is or is not obscene. The question is whether the particular pictures or photographs depicting the

nude human body in the particular manner in which they are depicted in these pictures or photographs are obscene.

* * * * *

ARGUMENT

1. Petitioner principally argues that it was reversible error for the trial court to exclude photographs, magazines, books and other publications relating to nudity, available to the public in the District of Columbia, which petitioner sought to introduce to show that, under contemporary community standards, the material he had distributed through the mails was not obscene. Although the proper proof of contemporary community standards may be admissible (see *Smith* v. *California,* 361 U.S. 147, 164–167, 171–172 (concurring opinions)), it does not follow that, because certain material is publicly sold in a particular community, its nature and content by itself, without proper selectivity and guidance, provides a fair index of the community consensus of what is or is not obscene. Thus, it may well be that the material sought to be introduced for comparison purposes is in and of itself obscene (see the comments of the trial court in excluding the comparison material, R. 124–130). It may also be that, irrespective of its merit or lack of merit, the material is not fairly comparable to that which is charged to be non-mailable. In this case, for example, the works of art which petitioner sought to introduce for purposes of comparison were totally dissimilar to the material petitioner had mailed. As the trial judge noted, it is

not the depicting of a nude figure which is the test of prurience, but how the figure is posed and portrayed in the particular circumstances (R. 129–131). In so ruling, the trial court by no means held that such comparative material was irrelevant under all circumstances (compare *Smith* v. *California, supra,* 361 U.S. at 165 (Frankfurter, J., concurring)). But the introduction of such material, without guidance by one qualified to select the material properly or explain it adequately, would have tended to confuse, rather than clarify, the task of the jury. Without such guiding testimony, not only would the jury have had to make particular judgments as to whether the comparison material actually mirrored community morality, but the jury would also have had to determine in each instance whether the comparison material was actually comparable to the material challenged as obscene. Since petitioner proffered the comparison material without adequate expert guidance, the trial court was correct in refusing to impose the onerous burden upon the jury by admitting the material. See *United States* v. *Hochman,* 175 F. Supp. 881, 882, affirmed, 277 F. 2d 631 (C.A. 7), certiorari denied, 364 U.S. 837; *United States* v. *Levine,* 83 F. 2d 156, 158 (C.A. 2); *Clarke* v. *United States,* 160 A. 2d 97, 98 (D.C. Mun. Ct. of Appeals); *Commonwealth* v. *Donaducy,* 167 Pa. Super. 611, 614–615, certiorari denied, 341 U.S. 949.

Petitioner asserts further that he was foreclosed from inquiring of his expert witnesses what, in their opinions, would be obscene material under prevailing

community standards.[7] The record reveals that his four expert witnesses—two psychologists and two psychiatrists—were permitted to testify whether, in their opinions, the dominant theme of the challenged material appealed to the prurient interest of the average person (see the Statement, *supra*, p. 5). Only when petitioner sought to inquire of Dr. Davy whether the material under indictment would appeal to the prurient interests of the average person, "applying contemporary community standards," did the trial judge exclude the question (see R. 138–139). This ruling was correct, and there is no occasion to review the trial judge's determination. Clearly the trial court did not exclude the testimony on the ground that no expert under any circumstances was competent to testify to such matters (compare *Smith* v. *California*, *supra*, 361 U.S. at 165, 166–167; A.L.I. Model Penal Code, Tentative Draft No. 6, § 207.10(2); Obscene Publications Act, 1959, 7 & 8 Eliz. 2, Ch. 66, § 4). In the present case, however, the standards of the community were outside the scope of the known expertise of these particular witnesses.[7] While it may be that as experts in the sciences of psychology and psychiatry they were qualified to express expert opinions as to the reactions of individuals who might view the photographs petitioner had mailed, they were not shown to be possessed of any particular knowledge permitting them to testify on the intellectual and moral climate

[7] As for petitioner himself, he was qualified as an expert in philosophy, not in a discipline which would permit his own testimony on community standards (R. 121–123).

of the community.[8] Hence, there is in this case no issue as to whether a witness who has been qualified as an expert in sociology or in any other discipline particularly concerned with community mores should be permitted to testify on community standards. No such qualified experts took the stand. To the extent that experts did take the stand and testify, they were allowed to state information pertinent to matters shown to be within their professional competence.

2. Petitioner next contends that the trial judge failed to instruct the jury in accordance with the standards of *Roth* v. *United States*, 354 U.S. 476, particularly insofar as the court emphasized the importance of the prurient appeal of the material to children and particularly susceptible persons. The charge does not bear out this complaint. The court affirmatively directed the jury that "[t]he test in each case is the effect of the publication considered as a whole, not on any particular class or any particular group, but upon all those whom it is likely to reach" (R. 213). And again (*Ibid.*):

> * * * the jury is to consider the community as a whole, the young and the old, educated and uneducated, religious and irreligious, man, woman, or child.

In all significant respects the charge here comported with the *Roth* standard.

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[8] Petitioner asserts further that he was not permitted to elicit from Dr. Eliasburg the reasons for his opinion. The facts show to the contrary that Dr. Eliasberg was asked for and gave the reasons for his opinion (R. 186).

Petitioner also argues that the question of obscenity should not have gone to the jury at all since the photographs were not obscene as a matter of law. An examination of the photographs (see Gov. Exs. 11, 12, 18) will reveal that the issue of obscenity was properly left to the jury and that it had ample reason to find the material non-mailable.

3. There is no merit to petitioner's claim that illegally obtained evidence was admitted against him on his trial. Prior to trial, petitioner moved for suppression and return of his entire mailing list seized from his business premises following his arrest therein on January 5, 1960, under a warrant of arrest, on the ground that the search "was not made to obtain evidence but was made with the purpose of seizing defendant's mailing list in an effort to prevent the defendant from continuing his magazine publishing operations * * *" (R. 10–11). The government opposed this motion, pointing out that, following the receipt of numerous complaints by the Post Office Department in February 1959, an investigation was commenced which provided probable cause for the obtaining of an arrest warrant, and that the seizure was incident to that arrest (R. 11–12, 16–18). On February 1, 1960, prior to the commencement of the trial, the court ordered return of petitioner's mailing list except for the "approximately seventeen cards relating to the names and addresses referred to in the indictment herein * * *" (R. 18).

Petitioner now contends that the affidavit of postal inspector Simon in support of the warrant of arrest

was insufficient in that, although it stated that petitioner deposited for mailing, on August 10, 1959, an envelope containing "lewd, lascivious, or indecent pictures" and that the affiant personally received the envelope and its contents, it failed to state that the inspector examined the photographs or considered them obscene (Pet. 9). This argument assumes that the obvious must be spelled out in punctillious detail. The thrust of the affidavit is that the inspector examined the pictures and believed them to be obscene. The warrant of arrest was therefore valid, and the search and seizure incident thereto proper. See *United States* v. *Rabinowitz,* 339 U.S. 56; *Abel* v. *United States,* 362 U.S. 217.

4. Petitioner further claims (a) that he was unfairly prejudiced by the fact that the government produced teen-age witnesses who received his advertising material; (b) that certain letters he had written unrelated to the events in the indictment were introduced in evidence; (c) that the trial court erred in instructing the jury that it was immaterial whether or not petitioner believed the material to be obscene, as long as he knowingly mailed it with knowledge of its content; and (d) that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague. None of these arguments has merit.

(a) The present case went to the jury on a 29-count indictment. Each count charged a separate mailing in violation of 18 U.S.C. 1461, and each of the teen-age witnesses who testified for the government had received circulars from petitioner giving information

as to where and how obscene material might be purchased (see the Statement, *supra*, p. 3). Manifestly, the testimony of each of these recipients was essential for the government to prove its case.

(b) The letters which were introduced in evidence were written by petitioner under the letterhead of "Trim", a magazine owned by him and one of his many outlets for the distribution of nude photographs (R. 82, 99, 101–103). Since these letters tended to reveal petitioner's activities as those of a commercial operator in obscenity (R. 75–76, 172–173), they were clearly admissible to show the guilty knowledge required by the statute. See *Roth* v. *United States*, *supra*, 354 U.S. at 494, 495–496 (conc. ring opinion of Mr. Chief Justice Warren).

(c) The trial judge was correct in instructing the jury that it was immaterial whether petitioner believed that the publications he mailed were obscene, for clearly there is a vast difference between the requirement of *scienter* (see *Smith* v. *California*, *supra*) and the question of petitioner's opinion that the material he had mailed was not obscene. As the judge properly charged: "[I]f the jury find that [the material] was obscene and was deposited in the mail or was caused to be deposited in the mail by the defendant, and the defendant knew its contents, the offense is complete * * *" (R. 214). See *Rosen* v. *United States*, 161 U.S. 29, 42; *Roth* v. *United States*, *supra*, 354 U.S. at 491.

(d) Petitioner's claim that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague is pre-

cisely the same argument which was raised in *Collier* v. *United States*, No. 571, this Term, certiorari denied, March 6, 1961. As in that case, the amendatory language challenged by petitioner—"whoever * * * knowingly causes [non-mailable matter] to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *"—is not pertinent here since petitioner was tried in the District of Columbia, the place from which he mailed the allegedly obscene material. Insofar as applicable to the present case, the constitutionality of 18 U.S.C. 1461 was upheld in *Roth* v. *United States*, 354 U.S. 476, 490–491. See the Government Brief in Opposition, No. 571, this Term, pp. 5–6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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